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No. 94-834

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NORTH STAR STEEL COMPANY,
Petitioner,

v.

CHARLES A. THOMAS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, in actions brought under the federal Worker Adjustment and Retraining Notification Act, the applicable limitations period should be drawn from Section 10(b) of the National Labor Relations Act rather than state law.

PARTIES TO PROCEEDINGS BELOW AND RULE 29.1 STATEMENT

Petitioner/Defendant Below

North Star Steel Company is a wholly-owned subsidiary of Cargill, Inc., which is a privately-held corporation. None of Cargill's shareholders are themselves publicly-traded entities.

Respondents/Plaintiffs Below

Respondents are Charles A. Thomas; Darren Boop; Robert W. Bower; William D. Bridge; James Clingan; Neil B. Housner; Jonathan L. Noaker; Wayne D. Orner; Gerald W. Ranck; Harold E. Van Sickle, Jr.; Richard A. Winter; and Eugene L. Witmer, Sr.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 32 F.3d 53. The decision of the district court (Pet. App. 17a-25a) is reported at 838 F. Supp. 970. A further decision of the district court (Pet. App. 26a-28a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1994. (Pet. App. 1a-16a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Worker Adjustment and Retraining Notification Act ("Warn" or "the "Act"), 29 U.S.C. § 2101 *et seq.*, is set forth at Pet. App. at 29a to 37a. Section 10(b) of

the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), is set forth at Pet. App. at 38a.

STATEMENT OF THE CASE

For many years, Petitioner North Star Steel Company ("North Star") operated a steel plant in Milton, Pennsylvania. On February 25, 1991, North Star ceased operations at the facility and laid off its workforce, an event that constituted a "plant closing" under WARN. Twenty months after the closing, Respondents, who are twelve former salaried employees at the plant, brought suit alleging that they did not receive sufficient advance notice of their layoff as required by WARN. North Star defended the claim on the ground that Respondents' action is time-barred. Because the WARN statute itself does not specify a limitations period, the question presented is whether the six-month limitations period contained in the NLRA should be borrowed for WARN claims, in which case Respondents' claims would be barred, or whether some unspecified limitations period should be borrowed from state law, in which case Respondents' claims presumably would survive.

1. *The Statutory Framework.* After years of often acrimonious debate, Congress enacted WARN on August 4, 1988, to provide "workers, their families and communities" with advance written notice of impending "plant closings" and "mass layoffs."[1] *See* 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1(a) (1994); 134 Cong. Rec. 15923 (1988). Under WARN, an employer must notify both its

[1] WARN generally defines a "plant closing" as a shutdown of a single site of employment, or an operating unit at a site of employment, that results in an actual or expected employment loss of six months for 50 or more full-time employees. *See* 29 U.S.C. § 2101(a)(2). A "mass layoff" is a reduction in force, other than a plant closing, that results in an actual or expected employment loss of six months for at least 33 percent of the employees at an employment site (provided that at least 50 individuals suffer such an employment loss) or 500 employees. *See* 29 U.S.C. § 2101(a)(3).

affected employees (or their union representatives) and local government sixty days prior to an employment loss. *Id.* An employer who implements a plant closing or mass layoff without providing the requisite notice may be held liable to each employee for lost wages and benefits for each day of violation up to sixty days. 29 U.S.C. § 2101 (a)(6). No additional remedy, other than attorney's fees for a successful plaintiff, are available to employees under WARN. 29 U.S.C. § 2104(b).

To obtain the remedy provided by statute, aggrieved employees (or their representatives) may bring suit in "any district court of the United States [where] the violation is alleged to have occurred, or in which the employer transacts business." 29 U.S.C. §§ 2104(a)(5)-(6). Although WARN provides for such actions, it does not include an express statute of limitations.

2. *The North Star Plant Closing and Related Litigation.* Respondents' claim was not the first round of WARN litigation to arise from the February 25, 1991 shutdown of the Milton plant. On September 9, 1991, the United Steelworkers of America ("USWA"), a union representing approximately 250 former employees of the facility, timely filed suit on behalf of its members alleging that North Star failed to provide it or them with sufficient notice of the closing. On April 9, 1992, the same district court involved here awarded USWA summary judgment on liability holding, in part, that the layoff constituted a "plant closing" violative of WARN. In a separate order dated December 11, 1992, the district judge determined the number of days for which the company was required to pay WARN damages. *United Steelworkers v. North Star Steel Co.*, 809 F. Supp. 5 (M.D. Pa. 1992), *aff'd in relevant part*, 5 F.3d 39 (CA3 1993), *cert. denied*, 114 S. Ct. 1060 (1994).

Respondents, twelve salaried employees at the Milton plant, were unrepresented by USWA and, thus, not specifically involved in the *United Steelworkers* litigation.

However, on October 22, 1992, more than six months after the district court's determination of a violation and more than twenty months after the layoff occurred, Respondents filed this action in the United States District Court for the Middle District of Pennsylvania seeking to collect their own WARN damages against North Star.

3. *The Proceedings Below.* On April 1, 1993, North Star moved for summary judgment against Respondents on the ground that their action was time-barred. Noting that WARN itself contained no statute of limitations, North Star argued that the court should borrow the six-month limitations period set forth in Section 10(b) of the NLRA. Respondents argued that their complaint was timely because the court, instead, should borrow a longer statute of limitations from state law, such as the three-year limitations period contained in the Pennsylvania Wage Payment and Collection Law.

On May 25, 1993, the district court granted North Star summary judgment. Applying *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the trial judge determined that the NLRA provided a closer analogy to WARN than any available state statute and that the federal policies at stake and the practicalities of litigation made it appropriate to borrow the NLRA limitations period.

Respondents' appeal to the Third Circuit was consolidated with the appeal of Crown Cork & Seal Co., an employer which had been unsuccessful in asserting the Section 10(b) limitations period in a WARN action in the Eastern District of Pennsylvania. *United Steelworkers v. Crown Cork & Seal Co.*, 833 F. Supp. 467 (E.D. Pa. 1993), *aff'd*, 32 F.3d 53 (CA3 1994), *cert. granted*, No. 94-835, 1995 WL 3914 (Jan. 6, 1995) (unreported) (consolidated with the instant case). In reversing the judgment for North Star and affirming the ruling against Crown Cork, the court of appeals held that an unspecified state statute of limitations, rather than the NLRA, should

govern WARN actions. Although it acknowledged that "none of the possible state laws provide perfect analogies to WARN," that "courts have looked to NLRA cases in interpreting WARN," and "that there are some definitional overlaps" between the two federal statutes, it nonetheless interpreted *DelCostello* to require application of a state limitations period. Pet. App. 10a. The Third Circuit reached this decision despite being unwilling—or perhaps unable—to decide which of a multitude of possible state limitations periods actually would control WARN actions in Pennsylvania.

4. *The Split Among the Circuits.* The Third Circuit's ruling in this case is in accord with the Second Circuit's earlier holding in *United Paperworkers International Union, Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (CA2 1993), a decision that also concluded WARN is not sufficiently analogous to the NLRA to warrant application of a federal limitations period.

Two weeks after the Third Circuit issued its opinion, however, a panel of the Fifth Circuit, under virtually identical factual circumstances, reached the opposite conclusion as to the appropriate limitations period for WARN. *Halkias v. General Dynamics Corp.*, 31 F.3d 224, *en banc rehearing granted*, Nos. 93-1664, 93-1680, 93-8204 (CA5 Sept. 22, 1994 (unreported)). In affirming a series of lower court rulings that adopted Section 10(b) as the proper limitations period for WARN, the court noted "the necessity for a uniform limitations period for WARN claims" and found the NLRA to be "a *closer analogy* than available state statutes." 31 F.3d at 233 (citing *DelCostello*, 462 U.S. at 171-72) (emphasis in original).

Just two months after *Halkias* was decided, the Sixth Circuit also borrowed the NLRA limitations period for WARN. *United Mine Workers v. Peabody Coal Co.*, 38 F.3d 850 (CA6 1994). The Sixth Circuit affirmed a district court's application of the Section 10(b) limitations period, finding that "section 10(b) of the NLRA provides

the more analogous limitations provision and better effectuates the policies underlying WARN . . . ." 38 F.3d at 856. Echoing the reasoning of the *Halkias* court, the Sixth Circuit expressly rejected the holding and rationale of the *Crown Cork* and *Specialty Paperboard* rulings. *See Peabody Coal,* 38 F.3d at 855; *Halkias,* 31 F.3d at 228.

SUMMARY OF ARGUMENT

I. WARN, like many federal laws, fails to contain an express statute of limitations. Rejecting the notion that claims arising under such statutes should last indefinitely, this Court traditionally has attempted to borrow analogous limitations periods from state law. However, "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking," federal limitations periods are applied instead. *DelCostello v. International Bhd. of Teamsters,* 462 U.S. 151, 172 (1983).

In rejecting North Star's contention that the WARN limitations period should be borrowed from Section 10(b) of the NLRA, rather than from state law, the court of appeals severely misapplied the *DelCostello* standard. The Third Circuit failed to acknowledge the need for federal uniformity, failed to recognize the similarity in purpose and structure between WARN and the NLRA, and failed to appreciate how the long-standing federal policy favoring quick resolution of employment disputes is fully applicable to WARN.

Because WARN is a unique federal statutory creation without analogy in state law, the lower courts that have attempted to borrow a state limitations period understandably have failed to agree on which kind of limitations should apply. This resulting lack of uniformity has resulted in intolerable uncertainty and time-consuming litigation. *See Peabody Coal,* 38 F.3d at 855-56. Without

adoption of a uniform federal limitations period, such wasteful litigation undoubtedly will proliferate, given the interstate nature of many WARN claims and the nearly limitless opportunities for forum shopping that WARN's expansive venue provision provides. *Id.*

That the NLRA clearly provides a suitable analogy to WARN can hardly be questioned. Both statutes serve a similar purpose: to protect workers and their communities from managerial practices that are inimical to the general welfare. 29 U.S.C. § 141(b); 20 C.F.R. § 639.1 (a) (1994). Moreover, both statutes impose parallel layoff notification requirements on employers and are structurally similar. Indeed, the text of WARN incorporates several key provisions from the NLRA, and both judicial decisions and interpretative regulations under WARN have borrowed extensively from the NLRA. *Peabody Coal,* 38 F.3d at 856.

Finally, the Third Circuit's decision overlooks the longstanding federal interest in speedy resolution of employment disputes—a policy fully applicable to WARN. *Halkias,* 31 F.3d at 238. WARN's legislative history indicates that Congress intended to provide a system for *prompt* assistance to dislocated workers. S. Rep. No. 62, 100th Cong., 1st Sess. 2 (1987). This purpose is reflected in the Act's remedial provisions, which limit damages for each affected employee to sixty days' wages and benefits. 29 U.S.C. § 2104(a)(1)(B). Moreover, given that WARN applies only to employers who are shutting down or significantly curtailing their operations, adoption of a short limitations period has the practical effect of severely impeding if not preventing litigation after records have been lost and witnesses and claimants scattered. *Halkias,* 31 F.3d at 238.

Because fundamental *DelCostello* criteria favoring federal borrowing were misapplied, and a wasteful and inappropriate policy applying state law was adopted instead, the judgment of the Third Circuit should be re-

versed, and the judgment of the district court dismissing the complaint should be reinstated.

II. Although the *DelCostello* framework establishes the applicability of the NLRA limitations period to WARN, the Court should re-examine the wisdom of its limitations borrowing doctrine. That doctrine originated last century, when the federal judiciary began borrowing state limitations periods for "silent" federal statutes under the supposed command of the Rules of Decision Act. *McCluny v. Silliman*, 3 Pet. (28 U.S.) 270 (1830). Although the role of the Rules of Decision Act in assertedly compelling such borrowing has been discredited, *DelCostello*, 462 U.S. at 159 n.13, the practice of borrowing state law has not. Without revisiting the issue as a matter of first principle, the Court has premised such continued borrowing on the view that Congress "intends by its silence that we borrow state law." *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147 (1987).

After the recent passage of a "fallback" statute of limitations period for future federal legislation, 28 U.S.C. § 1658, however, Congress no longer is silent on this issue. Rather, Congress has declared that the Court's existing practice of state-law borrowing "lack[s] persuasive support as a matter of policy," 136 Cong. Rec. S17,581 (daily ed. Oct. 27, 1990); *see also* H.R. Rep. No. 734, 101st Cong., 2d Sess. 24 (1990). Specifically, Congress has noted that the current practice imposes costly "uncertainty upon litigants," "undesirable variance among the federal courts," and "disrupts the development of federal doctrine on the suspension of limitations periods." H.R. Rep. No. 734, 101st Cong., 2d Sess. 24 (1990).

All of these perceived flaws in the current borrowing doctrine—which are recognized by courts and commentators—could be cured by adoption of a policy under which only federal law would be used to determine most, if not all, federal limitations periods. Under such a sys-

tem, the applicability of the six-month NLRA limitations period to the present action would be beyond dispute, since the NLRA is clearly the federal statute most analogous to WARN.

ARGUMENT

I. THE COURT'S ESTABLISHED BORROWING DOCTRINE DIRECTS THAT THE NLRA, AND NOT STATE LAW, SHOULD BE USED TO SUPPLY THE WARN LIMITATIONS PERIOD.

A. Federal Law Provides An Appropriate Vehicle For Interstitial Lawmaking.

WARN is not alone among federal statutes in failing to provide an explicit limitations period. *See Reed v. United Transp. Union*, 488 U.S. 319, 323 (1989) ("Congress not infrequently fails to supply an express statute of limitations when it creates a federal cause of action."). When confronted with such circumstance, this Court generally assumes that Congress did not intend to allow potential claims to last indefinitely. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (quoting *Adams v. Woods*, 2 Cranch (6 U.S.) 336, 342 (1805)) ("A federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.' "). Rather, this Court further assumes that Congress intends the judiciary to bridge the legislative gap by "borrowing" a limitations period from a comparable statute. *Agency Holding Corp.*, 483 U.S. at 147.

For many decades, this Court interpreted the Rules of Decision Act as permitting limitations borrowing only from state law.[2] *See, e.g., Campbell v. City of Haverhill*, 155 U.S. 610 (1895); *McCluny v. Silliman*, 3 Pet. (28

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[2] Rules of Decision Act, ch. 20, § 34, 1 Stat. 73, 92 (1789) (now codified with minor changes at 28 U.S.C. § 1652). The Rules of Decision Act originally provided: "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." *Id.*

U.S.) 270 (1830). In more recent times, however, the Court has rejected the notion that the Rules of Decision Act mandates the application of state limitations periods to claims arising under federal statutes that are silent on the limitations issue. *DelCostello*, 462 U.S. at 160 n.13 (rejecting reliance "on a few turn-of-the-century cases suggesting that the Rules of Decision Act compels application of state limitations periods"). Later Court decisions have concurred in this view. *See, e.g., Agency Holding Corp.*, 483 U.S. at 147.

In place of the supposedly unyielding command of the Rules of Decision Act, *DelCostello* substituted a doctrine that continues the preference for absorbing state statutes but acknowledges the wisdom of borrowing limitations periods from federal law in appropriate cases. As the Court observed, "[s]tate legislatures do not devise their limitations periods with national interests in mind," and, thus, "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law." 462 U.S. at 161 (quoting *Occidental Life Ins. Co. v. Equal Employment Opportunity Comm'n*, 432 U.S. 355, 367 (1977) (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975)). In furtherance of this principle, the Court redefined the standard for federal limitations borrowing as follows:

> [W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we [will] not hesitate[] to turn away from state law.

DelCostello, 462 U.S. at 172. The Court described the continued preference for borrowing state statutes as "a sort of fallback rule of thumb." *Id.* at 160 n.12.

Following this approach, the *DelCostello* Court applied the six-month limitations period contained in Section 10(b) of the NLRA to a "hybrid" Section 301/duty of

fair representation claim brought by an employee against both his employer and his collective bargaining representative. 462 U.S. at 165. Subsequently, the six-month NLRA standard has been applied to claims arising under other federal labor laws that contain no limitations period. *See, e.g., West v. Conrail,* 481 U.S. 35 (1987) (applying Section 10(b) to Railway Labor Act); *Haggerty v. USAir, Inc.,* 952 F.2d 781 (CA3 1992) (Section 10(b) applied to worker dislocation provisions contained in Airline Deregulation Act); *Aluminum, Brick & Glassworkers Int'l Union Local 674 v. A.P. Green Refractories, Inc.,* 895 F.2d 1053, 1054-55 (CA5 1990) (NLRA period applied to "pure" Section 301 action under Labor Management Relations Act).

In *Agency Holding Corp.,* 483 U.S. 143 (1987), the Court expanded and refined the *DelCostello* borrowing doctrine in a case outside the labor field. The issue was whether state or federal law should provide the limitations period for the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). Before reaching this ultimate question, the Court suggested an initial inquiry to be added to the *DelCostello* framework—one that focused on whether a uniform limitations period, of either state or federal law, was necessary "to avoid intolerable 'uncertainty and time-consuming litigation.' " *Id.* at 150 (quoting *Wilson v. Garcia,* 471 U.S. at 272). Given the difficulty of analogizing RICO actions to existing state statutes —and the danger that the multistate nature of RICO claims might lead to forum shopping—the Court found it wise to impose such uniformity. It then chose to borrow the limitations period contained in the Clayton Antitrust Act, concluding that this federal statute provided a "far closer analogy . . . than any state law alternative," and noting the "similarities in purpose and structure" between the two statutes. *Id.* at 150, 152.

In its most recent borrowing decision, the Court also found a federal limitations period to be applicable, this

time to claims brought under Section 10(b) of the Securities Exchange Act. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350 (1991). The Court's four-member plurality—whose mode of analysis (though not its result) appears to have been accepted by Justice O'Connor and Justice Kennedy in dissent[3]—suggested a three-tiered "hierarchical" approach to the *DelCostello* doctrine. *Id.* at 356-57. First, "the court must determine whether a *uniform* statute of limitations is to be selected," regardless of whether the limitations period is to be drawn from state or federal law. *Id.* at 357 (emphasis added). Second, "assuming a uniform limitations period is appropriate, the court must [then] decide whether this period should be derived from a state or a federal source," paying particular attention to the "geographic character of the claim" and "the danger of forum shopping." *Id.* Finally, if a federal limitations period satisfies the first two criteria, the court must then determine whether "an analogous federal source truly affords a 'closer fit' with the cause of action at issue than does any available state-law source." *Id.*

B. The Third Circuit Misapplied *DelCostello* And Its Progeny.

Although much of the above precedent was cited in the Third Circuit's decision, it largely was misapplied. The court of appeals failed to give sufficient weight to the need for a uniform WARN limitations period, failed to recognize the similarities in purpose and structure between WARN and the NLRA, and failed to consider how the long-standing federal policy favoring quick resolution of labor and employment disputes applies to WARN. All

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[3] Justice O'Connor and Justice Kennedy dissented only as to the details of the federal limitations period to be applied in *Lampf* and its retroactive application in light of longstanding, contrary judicial precedent—issues not presented in the context of WARN. *Lampf,* 501 U.S. at 369 (O'Connor, J., dissenting), 501 U.S. at 374 (Kennedy, J., dissenting).

of these criteria make the NLRA, and not state law, the most appropriate vehicle for interstitial lawmaking here.

1. *WARN requires a uniform limitations period, which only can be achieved by borrowing from federal law.*

As this Court repeatedly has found, "'[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.'" *Wilson,* 471 U.S. at 266 (quoting *Chardon v. Fumero Soto,* 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). With this precept in mind, the Court has not hesitated to establish a uniform statute of limitations—borrowed from an analogous federal law—when reliance on "traditional" state-law borrowing would result in "intolerable 'uncertainty and time-consuming litigation.'" *Agency Holding Corp.,* 483 U.S. at 150 (quoting *Wilson,* 471 U.S. at 272). The Court most often reaches this result when a federal statute's *sui generis* nature, multistate character, and broad venue provision make analogy to state law difficult—and hence increase the likelihood for conflicting lower court rulings and resulting forum-shopping opportunities. *See Agency Holding Corp.,* 483 U.S. at 154 ("With the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would virtually guarantee complex and expensive litigation over what should be a straightforward matter.") (citation omitted).[4]

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[4] Although a uniform limitations period seems to be a generally desirable objective, the Court has determined that, in limited circumstances, federal policy is not better served by such uniformity. The initial inquiry, therefore, is whether all claims arising out of a statute "'should be characterized the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.'" *Agency Holding Corp.,* 483 U.S. at 143 (quoting *Wilson,* 471 U.S. at 268). Given the obvious similarities in WARN litigation, there exists no suggestion in any reported case or comment that the limitations period for WARN should vary based upon the factual issues presented in each case.

a. ***Because state law is not analogous to WARN, courts are unable to agree on which type of state limitations period to apply.***

The few existing attempts to analogize WARN to state causes of action only serve to underscore the need for federal uniformity. For example, while the Second Circuit in *Specialty Paperboard* determined Vermont's six-year statute of limitations for breach of contract actions should apply to WARN, 999 F.2d at 53, another court, likewise attempting to identify the most analogous state cause of action, applied a three-year residual limitations period to a WARN claim. *Wholesale & Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs., Inc.*, 826 F. Supp. 326, 331 (C.D. Cal. 1993).

Indeed, here, the Third Circuit acknowledged the possibility that four different Pennsylvania limitations periods might be appropriate for WARN, but refused to decide among them. Pet. App. 15a. *See also Automobile Mechanics' Local No. 701 v. Santa Fe Terminal Servs., Inc.*, 830 F. Supp. 432, 435-37 (N.D. Ill. 1993) (refusing to choose between ten-year limitations period for written contracts, five-year period for oral contracts, or five-year catchall provision, noting that claim was timely under each); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192, 197 (E.D. Mich. 1993) (applying Michigan's six-year statute of limitations for contract actions).

After reviewing these unsuccessful efforts by its sister courts to agree on a type of state limitations period to apply, the Sixth Circuit rightfully concluded that federal uniformity was necessary to avoid the needless litigation that would result from strained attempts to analogize WARN to state law:

> The suggestions of possibly analogous limitations periods run the gamut from the catchall limitations period advocated here to those governing contracts or torts. Even the *Specialty Paperboard* and *Wallace* courts, which agreed that state contract limitations

> periods should apply, did so for divergent reasons. Add to these limitations periods, arguments that can be raised under state unemployment laws, state wage laws, state benefit laws, state plant closing laws, and the opportunites are endless. Thus, selecting a WARN limitations period implicates the same concerns for uniformity present in *Agency Holding Corp.*

Peabody Coal, 38 F.3d at 855-56.

b. ***The multistate nature of WARN claims makes a federal limitations period appropriate.***

In *Agency Holding Corp.*, the Court also noted that in situations when a federal statute frequently touches upon interstate transactions—such that a single alleged violation might lead to litigation over which state limitations period to apply—reliance on a uniform federal standard is appropriate. 483 U.S. at 153-54. Given the multistate nature of potential WARN claims, this factor also supports application of the NLRA limitations period to WARN.

Because WARN applies only to larger businesses, employing 100 or more employees, interstate concerns inevitably are implicated by the statute. *See* 29 U.S.C. § 2101(a)(1). Indeed, in circumstances where only a single facility is closed, it is possible, if not probable, that the decision to close that plant was made in another state, or that employees will be asked to transfer to facilities in other states. *See* 29 U.S.C. § 2101(b) (WARN implicated by transfers not within reasonable commuting distance). This geographic, multistate character of WARN's coverage militates strongly in favor of a uniform, national limitations period. *See Agency Holding Corp.*, 483 U.S. at 153-54.

Recent WARN litigation also demonstrates the likelihood—should state law apply—of expensive and time-consuming litigation in circumstances where an employer's single employment decision affects employees in dif-

ferent states. In *Halkias,* for example, General Dynamics' plant closing directly affected large numbers of employees in Texas, Oklahoma, and Missouri. The Fifth Circuit clearly was troubled by the prospect of having to determine which state limitations period would govern such a situation, or whether each group of employees would be covered by a different limitations period. *Halkias,* 31 F.3d at 237 ("Given the possibility for multistate WARN litigation, the issue of which state's limitations period should control might become an issue of time-consuming litigation.").[5]

c. *Application of state limitations periods would result in forum shopping.*

The danger of forum shopping is an equal if not more significant factor favoring adoption of a uniform federal limitations period. *See Lampf,* 501 U.S. at 357 (availability of forum shopping weighs heavily in favor of federal borrowing). In its decision, the Third Circuit summarily dismissed this concern, declaring that "workers will gain few advantages by suing in a court far from the site of injury." Pet. App. 13a (quoting *Specialty Paperboard,* 999 F.2d at 56). As *Halkias* and others have observed, however, this conclusion is completely erroneous.

WARN has an extraordinarily broad jurisdictional provision, which allows actions to be brought not only in "any district in which the violation is alleged to have occurred" but also in any district "in which the employer

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[5] Even had the *Halkias* court decided to apply a state limitations period and further determined that state contract law was most analogous to WARN, it still faced determining whether to apply a five-year limitations period in Missouri (Mo. Rev. Stat. § 516.120 (1)), a three- or five-year limitations period in Oklahoma (Okla. Stat. tit. 12, §§ 95(1), (2)), and/or a four-year limitations period in Texas (Tex. Civ. Prac. & Rem. Code Ann. § 16.004). The application of such divergent limitations periods to a single employment decision is inconsistent with the purpose of WARN as a national employment statute.

transacts business." 29 U.S.C. § 2104(a)(5). If state law were to govern the WARN limitations period, WARN plaintiffs who are untimely under their own state's statute could "shop"—perhaps years after their layoff—for a more favorable venue in which to pursue their action. Once there, it is extremely likely that their suit would be governed by the (presumably longer) limitations period of their "newly adopted" forum state. *See Halkias,* 31 F.3d at 237 (in "examining borrowing cases involving a conflict over which state's limitation period should apply, we find a consistent preference for borrowing the forum state's"); *Peabody Coal,* 38 F.3d 855 ("in today's national and international corporate environment," application of varying state limitations period would result in "limitless" opportunities for forum shopping).

Indeed, the Third Circuit so much as admitted this point when discussing North Star's companion case, *Crown Cork & Seal,* which involved a WARN claim brought in Pennsylvania for a layoff occurring in Perry, Georgia. In declining to decide whether Pennsylvania or Georgia law governed the Perry layoff, the court nevertheless acknowledged that "as a general rule the governing statute of limitations should be that of the state in which the federal court sits . . . ." Pet. App. 13a n.4 (quoting *Consolidated Express, Inc. v. New York Shipping Ass'n,* 602 F.2d 494, 507-08 (CA3 1979), *vacated on other grounds,* 448 U.S. 902 (1980)).[6]

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[6] *See also Vigman v. Community Nat'l Bank & Trust Co.,* 635 F.2d 455, 459 (CA5 1981) ("When federal law contains no limitations period applicable to a particular federal cause of action, federal courts are to apply the forum state's limitations period."); *Forrestal Village, Inc. v. Graham,* 551 F.2d 411, 413 (D.C. Cir. 1977) ("It is well established that when, as here, Congress has created a federal right but has not prescribed a limitation period for enforcement, federal courts will borrow the period of limitation prescribed by the state where the court sits"); *Vanderboom v. Sexton,* 422 F.2d 1233, 1236-37 (CA8) (Supreme Court cases "make it clear that when the federal legislative act is silent as to

Given this precedent, it is beyond cavil that borrowing state law to determine the WARN limitations period would provide extraordinarily fertile ground for forum shopping. Jurisdictions with little or no rational connection to the parties or to the triggering WARN event, but with long limitations periods, would become havens for litigating stale and otherwise time-barred claims. As there is no evidence that Congress intended such a perverse result, the Court should, for the reasons found applicable in *Lampf*, apply a uniform federal limitations period to WARN.

2. *The NLRA is a closer fit to WARN than any available state law source.*

In addition to these uniformity concerns, the Court has also concluded that reliance on a federal limitations period is appropriate when "an analogous federal source truly affords a 'closer fit' with the cause of action at issue than does any available state-law source." *Lampf*, 501 U.S. at 357. The Court often will seek to find "similarities in purpose and structure" between the two statutes to determine this relationship. *Agency Holding Corp.*, 483 U.S. at 152.

Although the Third Circuit undertook a perfunctory comparison of WARN and the NLRA, it mistakenly found insufficient similarities between the two federal statutes. Pet. App. 7a-15a. The court compounded its error by not even attempting to analogize WARN to proposed state statutes of limitations—an exercise perhaps abandoned due to the obvious dissimilarities between WARN and these provisions.

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the statute of limitations applicable to it, the limitations period of the forum state is applied."), *cert. denied*, 400 U.S. 852 (1970). *Cf. Ferens v. John Deere Co.*, 494 U.S. 516, 523-28 (1990) (In state law action for personal injury occurring in Pennsylvania, "transferee forum [of Pennsylvania was] to apply the law of the transferor court [of Mississippi]," even though "Mississippi's long limitation period no doubt drew plaintiffs to [that] State.").

a. *WARN and the NLRA impose parallel notification requirements on employers and are structurally similar.*

It cannot plausibly be contested that the policies and purposes of WARN and the NLRA overlap. The NLRA proscribes management practices "which affect commerce and are inimical to the general welfare." 29 U.S.C. § 141 (b). Similarly, WARN's purpose is to protect both individuals and communities from managerial practices that unexpectedly deprive large groups of workers of their livelihood. 20 C.F.R. § 639.1(a) (1994).

WARN and the NLRA also are the only two federal statutes which require employers to provide notice to their employees of impending plan closings and mass layoffs. As the Fifth Circuit correctly observed in *Halkias*, "[t]he NLRA is more than just analogous to WARN; in fact, WARN may be thought of as an outgrowth of the NLRA, because §§ 8(a)(1) and 8(a)(5) of the NLRA . . . [both] have been interpreted to require an employer to notify a union of its decision to close a plant." 31 F.3d at 232 (citing *Penntech Papers, Inc. v. National Labor Relations Bd.*, 706 F.2d 18, 26 (CA1) (NLRA requires employer to provide "timely notice to the union of the decision to close"), *cert. denied*, 464 U.S. 892 (1983)). *See also Dubuque Packing Co.*, 303 N.L.R.B. 386 (1991) (NLRB imposes affirmative duties on employers resulting from decision to close plant), *review granted in part, enforcement granted in part, remanded*, 1 F.3d 24 (D.C. Cir. 1993), *cert. dismissed*, 114 S. Ct. 2157 (1994).

In addition to recognizing that WARN and the NLRA impose parallel requirements upon employers implementing workforce reductions, several courts have commented on the obvious structural similarities between the two federal statutes. " '[T]he family resemblance is undeniable, and indeed there is a substantial overlap' between them." *Halkias*, 31 F.3d at 231 (quoting *DelCostello*,

462 U.S. at 170); *see also Peabody Coal,* 38 F.3d at 852 ("WARN cross-references the NLRA in several respects."); *Newspaper & Mail Deliverers' Union v. United Magazine Co.,* 809 F. Supp. 185, 191 (E.D.N.Y. 1992) ("the relationship between WARN and the NLRA is strengthened" by linguistic similarities). The district court in this case made similar observations. Pet. App. 20a-22a.

In fact, WARN's definitional borrowing from the NLRA occurs in both the actual text of WARN (*see* 29 U.S.C. § 2103(2), providing that NLRA "economic strikers" are not entitled to notice, and 29 U.S.C. § 2101(a)(4), incorporating NLRA definition of "exclusive representative"), and in the Labor Department's implementing regulations. *See, e.g.,* 20 C.F.R. § 639.3(d) (1994) (defining "representative" for WARN purposes by explicit reference to subsections 9(a) and 8(f) of the NLRA); 20 C.F.R. § 639.3(a)(1)(ii) (1994) (defining reasonable expectation of recall"); 20 C.F.R. § 639.3(a)(2) (1994) (defining "independent contractors and subsidiaries" by reference to NLRA case law). Indeed, Congress itself recognized the interrelationship between the NLRA and WARN by including the following provision in the statute:

> The giving of notice pursuant to this chapter, if done in good faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act. . . .

29 U.S.C. § 2108.

b. ***The close relationship between WARN and the NLRA has been recognized by all three branches of government.***

Given the linguistic overlap between WARN and the NLRA, "it is not surprising that, like the Department of Labor, federal courts [also] have turned to NLRA case law in interpreting WARN." *Halkias,* 31 F.3d at 232. This

borrowing occurs not just in the area of limitations, but also to fill in legislative gaps throughout the statute. Indeed, in *United Steelworkers*, 809 F. Supp. at 9, the earlier action against North Star arising from the same factual circumstances, the court borrowed provisions of the NLRA to determine prejudgment interest and attorney's fees. *See also, e.g., Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1283 (CA5 1994) (borrowing NLRA's "back pay" definition), *cert. denied*, No. 93-1857), 1994 WL 213246 (U.S. Jan. 23, 1995); *Union of Elec., Elec. Salaried Machinists & Furniture Workers Local 397 v. Midwest Fasteners, Inc.*, 779 F. Supp. 788, 796 (D.N.J. 1992) (borrowing NLRA's "single employer" test); *Damron v. Rob Fork Mining Co.*, 739 F. Supp. 341, 344 (E.D. Ky. 1990) (borrowing NLRA's "reasonable expectation of recall" standard for determining similar provision in WARN), *aff'd*, 945 F.2d 121 (CA6 1991); *Washington v. Aircap Indus. Corp.*, 831 F. Supp. 1292, 1296 (D.S.C. 1993) ("If the [WARN] regulations are not definitive, it may be appropriate to borrow definitions and factors employed by the NLRB.").

Congress was aware of this overlap between WARN and the NLRA when it debated passage of WARN and agreed upon its final language. Indeed, during the Senate floor debate on WARN, the ranking minority member of the Senate Labor Committee cautioned that WARN "constitutes a major change in the National Labor Relations Act; so much so that it "bascially [sic] . . . amend[s] the [NLRA]." 134 Cong. Rec. 15923, 15924 (1988) (remarks of Senator Hatch).[7] After WARN's enactment, the National Labor Relations Board's General Counsel " 'predicted substantial interplay between the new law [(WARN)] . . . and the nation's basic labor law administered by the NLRB.' " *Halkias*, 31 F.3d at 231-32 (quoting 226 Daily Lab. Rep. (BNA) A-3 (Nov. 23, 1988)).

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[7] *See also* 134 Cong. Rec. at S8605-86-66, 8610-8620 (June 27, 1988); *id.* at S8451-8458 (June 23, 1988); *id.* at S7358-7362 (June 8, 1988).

c. *The Third Circuit erroneously discounted WARN's interrelationship with the NLRA.*

Despite these numerous connections and analogies between the two federal statutes, the Third Circuit's decision here rests on a supposed "lack of similarity between the NLRA and WARN." Pet. App. 10a n.2. To support this astounding conclusion—remarkable in light of the extensive authority reviewed above—the court described WARN as a "substantive" statute, while maintaining that the NLRA "is concerned with ensuring an equitable bargaining process." Pet. App. 7a, 8a (citation omitted). The court also maintained that the statutes are not analogous because, allegedly unlike the NLRA, "[t]he benefits of WARN accrue not only to unionized workers but to all workers alike." Pet. App. 8a.[8]

The Third Circuit's reasoning is both factually flawed and premised on a distorted understanding of this Court's precedent. First, the Third Circuit's attempt to draw a distinction between the "substantive" nature of WARN and the "procedural" purpose of the NLRA is mistaken. It is beyond question that the NLRA creates significant substantive rights for all employees—including the Section 7 right to engage in concerted activity and the right of unionized employees to notice of layoffs and terminations. Indeed, as *Halkias* correctly observed,

> The purposes of the NLRA are similar to those of WARN. Both regulate labor-management relations:

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[8] In *Specialty Paperboard*, the Second Circuit justified its borrowing of Vermont's six-year residual limitations period on similar grounds. *See Specialty Paperboard*, 999 F.2d at 54-55 ("purpose of WARN, unlike that of the NLRA, is not to ensure labor peace but to alleviate the distress associated with job loss . . ."; WARN "has only a tangential effect on collective bargaining"). *See also* A. Kent Mayo, Comment, *Warning! This Claim Will Not Self-Destruct In Six Months—Claims Arising Under The 1988 Worker Adjustment And Retraining Act*, 72 Wash. U. L.Q. 545 (Spring 1994) (outlining Second Circuit's reasoning).

> WARN, by requiring notice of impending layoffs and terminations; the NLRA, by facilitating concerted action by employees and governing collective bargaining procedures. Both do so to achieve similar objectives.
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> * * * *
>
> WARN's purpose may be seen as a subset of the NLRA's . . . .

31 F.3d at 233. *See also* Pet. App. 21a (district court here observed that, "[w]hile the specific rights created by [WARN and the NLRA] are different, the policies behind each of the acts are consistent, mutually-reinforcing, and to some extent identical.").

Moreover, even assuming for the sake of argument that a distinction between the procedural and substantive "purposes" of the statutes could be discerned, the Third Circuit's asserted basis for rejecting federal borrowing still would be inadequate. As the Fifth Circuit observed,

> [a] strict identity of purposes is not a requisite for borrowing a limitations period from one federal statute for use in another. To the contrary, a federal statute's limitations period is to be borrowed, if, among other things, it provides a *closer analogy* than available state statutes. If an identity of purposes were required, it would seem that the Court [in *Agency Holding Corp.*] would not have borrowed the Clayton Act's limitations period in establishing a uniform period for RICO.

Halkias, 31 F.3d at 233 (citations and quotations omitted) (emphasis in original). *See also Peabody Coal*, 38 F.3d at 856 ("[D]espite admitted differences between WARN and the NLRA, both are designed to afford protection against job loss—a safeguard that goes to the heart of the employment relationship . . . . [T]his similarity of purpose provides the analogy necessary to extend section 10(b) outside the parameters of the NLRA.") (citation omitted).

Similarly in error is the Third Circuit's statement that the NLRA protects only unionized employees. Like WARN, the NLRA applies to employment disputes even when the affected employees are not represented by a union.[9] For example, the NLRA protects activities undertaken by employees for "mutual aid and protection" without regard to any collective bargaining relationship or the employees' desire for unionization. *See, e.g., National Labor Relations Bd. v. Columbia Univ.*, 541 F.2d 922, 931 (CA2 1976) ("there can be little doubt that the protection afforded to concerted activities under the NLRA applies equally to workers in unionized or in non-unionized firms"); *Hugh H. Wilson Corp. v. National Labor Relations Bd.*, 414 F.2d 1345, 1347 (CA3 1969) ("The mantle of protection of concerted activities . . . extends to both union and non-union employees.") (footnotes omitted), *cert. denied*, 397 U.S. 935 (1970); 1 *The Developing Labor Law* 137 (P. Hardin *et al.* eds., 3d ed. 1992) (NLRA "broadly protects 'concerted' activity, not merely union activity."). In essence, the NLRA applies to any dispute between an employer and its employees acting as a group—much like WARN protects employees from "mass layoffs," but not individual terminations.

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[9] That the NLRA protects all employees, not just union members, is well-supported by case law. The NLRA even provides protections for individual workers against unions. *See, e.g., National Labor Relations Bd. v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984) ("There is no indication that Congress intended to limit [NLRA § 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."); *Pittsburgh Press Co. v. National Labor Relations Bd.*, 977 F.2d 652, 655 (D.C. Cir. 1992) ("Section 8(b)(1)(A) of the NLRA makes it an unfair labor practice for a union to restrain or coerce an employee in the exercise of his or her rights protected by the Act, including the right to refrain from assisting a labor union."); *Local Union 1397, United Steelworkers v. United Steelworkers*, 748 F.2d 180, 183 (CA3 1984) (noting that NLRA is concerned with protecting individual workers from arbitrary action by unions); *Scooba Mfg. Co. v. National Labor Relations Bd.*, 694 F.2d 82, 84 (CA5 1982) ("The mere fact that an employee acts alone does not preclude treatment of his action as a protected

d. ***The Third Circuit erred by applying Pennsylvania law without finding any analogy between WARN and the suggested state limitations periods.***

Another striking weakness in the Third Circuit's reasoning is the court's failure to review the Pennsylvania statutes that it determined to be more analogous to WARN than the NLRA is. *See DelCostello*, 462 U.S. at 172 (federal law applies if it provides "closer analogy than available state statutes"). Had it attempted such a review, the court would have found precious little analogy between state law and WARN.

WARN constitutes federal labor legislation that has no relationship to state common law or to traditional areas of state regulation. *See Finnan v. L.F. Rothschild & Co.*, 726 F. Supp. 460, 465 (S.D.N.Y. 1989) ("notice obligations of WARN and the accompanying remedies are novel creations of Congress"). WARN's central purpose is to provide unions, employees, and affected communities with advance notice of large-scale layoffs, so that affected employees can have time to search for new work and a local government can make retraining and transition assistance available. 20 C.F.R. § 639.1(a) (1994). Even federal job retraining funds are coordinated with labor organizations through the states under the Job Training Partnership Act, 29 U.S.C. § 1656. WARN's purposes, and the statutory notice provisions designed to achieve them, never existed at common law. Rather, they are a unique federal statutory creation without analogy in state statutory provisions or in pre-existing constitutional guarantees.

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activity under the [NLRA]."), *cert. denied*, 466 U.S. 926 (1984); *National Labor Relations Bd. v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 445 (CA6 1981) ("Employees may engage in concerted activities protected by section 7 [of the NLRA] regardless of whether the employees are members of a union."); *Plasticrafts, Inc. v. National Labor Relations Bd.*, 586 F.2d 185, 190 (CA10 1978) ("It seems clear that the rights of individual employees are protected by Section 8(a)(1) of the Act—not merely the rights of the bargaining group as a whole.").

Perhaps as a consequence of this lack of similarity between WARN and any existing state law or cause of action, respondents in this case and in *Crown Cork & Seal* suggested no fewer than four alternative state limitations periods to the Third Circuit: the three-year Pennsylvania Wage Payment and Collection Law, Pa. Stat. Ann. tit. 43, § 260.9a(g) (1992); the four-year limitations period for implied contracts, 42 Pa. Cons. Stat. Ann. § 5525(4) (1980); the six-year state "residual" statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527 (1994); and Pennsylvania's two-year statute for enforcing civil penalties, 42 Pa. Cons. Stat. Ann. § 5524(5) (1994).[10] The dissimilarity between these statutes and WARN is self-evident. Indeed, in *Haggerty v. USAir, Inc.*, 952 F.2d 781 (CA3 1992), the Third Circuit previously rejected the applicability of many of the very same Pennsylvania statutes to an analogous claim for damages under the Airline Deregulation Act's worker dislocation provisions. *Id.* at 786.

Moreover, in considering a parallel group of Texas statutes in the context of WARN, the Fifth Circuit drew the following conclusions equally applicable to the Pennsylvania provisions:

> In sum, canvassing the possible Texas periods reveals none as analogous to WARN as the NLRA. None seeks to accommodate the same, or very similar, interests as WARN, much less govern an action that will frequently overlap with WARN. And, needless to say, none embraces causes of action that share common language with WARN.

Halkias, 31 F.3d at 235-36 (footnotes omitted). *See also Peabody Coal*, 38 F.3d at 855 ("The only commonality between WARN and the proffered state statute is that both are pieces of legislation.").[11]

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[10] For obvious timeliness reasons, Respondents did not proffer the six-month limitations period contained in the Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, § 959(h) (1994).

[11] When the district court assessed a comparison between the NLRA and potential Pennsylvania limitations periods advanced

By refusing even to consider the obvious dissimilarities between WARN and the proffered state limitations periods —and by failing to credit the widely-recognized analogies between WARN and the NLRA—the Third Circuit profoundly misapplied the precedent of *DelCostello* and *Lampf*. Any fair comparison of WARN to potential state statutes of limitations leads inexorably to the conclusion that federal law provides a far closer analogy, and that the NLRA should determine the WARN limitations period.

3. *The federal policies at stake favor the application of the NLRA's limitations period.*

Finally, as *DelCostello* holds, federal courts should "not hesitat[e] to turn away from state law" when "the federal policies at stake" support the borrowing of a federal limitations period. 462 U.S. at 172. By failing to recognize that quick resolution of labor disputes is an important federal interest fully applicable to WARN, the Third Circuit compounded its misapplication of the *DelCostello* criteria.

a. *Congress and the courts repeatedly impose short limitations periods for federal labor matters.*

The speedy resolution of employment disputes is a long-standing cornerstone of federal labor policy. *See Halkias*, 31 F.3d at 238 ("federal labor policy has long favored the rapid settlement of disputes between an employer and an employee"); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (discussing strong federal policy in favor of speedy resolution of industrial disputes through arbitration). Even when Congress includes limitations periods in federal statutes affecting the employer/employee relationship, the filing deadlines are

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here, it expressly determined that "the framework and goals of the National Labor Relations Act are such that it is more analogous to the Worker Adjustment and Retraining Notification Act than to any state statute of which we are aware." Pet. App. 22a.

consistently short. *See, e.g.*, National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (providing six-month limitations period for filing unfair labor practice charge before NLRB); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) (requiring the filing of an employment discrimination charge with the EEOC within 180 days); Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(d) (same); Americans With Disabilities Act, 42 U.S.C. § 12117(a) (same); Civil Service Reform Act of 1978, 5 U.S.C. § 7118(b) (requiring federal employees to file unfair labor practice charges within six months).

Given this statutory preference, it hardly is surprising that the courts have "borrowed" short federal limitations periods when Congress fails to include a statute of limitations in employment-related legislation. *See, e.g., DelCostello,* 462 U.S. at 169 (borrowing NLRA's six-month limitations period for "hybrid" Section 301/duty of fair representation claims); *Haggerty,* 952 F.2d at 787 (borrowing NLRA limitations period for worker dislocation provisions of Airline Deregulation Act). *See also Lloyd v. United States Dep't of Labor,* 637 F.2d 1267, 1271 (CA9 1980) (approving one-year limitations period for "retraining, adjustment and relocation" benefits under federal Trade Act of 1974); *Occidental Chem. Corp. v. International Chem. Workers Union,* 853 F.2d 1310, 1316 (CA6 1988) ("Given the desirability of a rapid resolution of disputes over an arbitrator's award, three months appears to us to be a more appropriate limit than six for an action attacking the validity of an award.").

b. ***A short limitations period is equally appropriate for WARN.***

Despite this established statutory and judicial preference for short labor limitations periods, the Third Circuit dismissed its applicability in a single paragraph. Without even acknowledging the existence of several other federal employment provisions that also have short limitations periods, the court, characterizing the burden of filing an

unfair labor practice charge under the NLRA as "minimal," concluded that applying this same six-month limitation period to WARN "could very well frustrate the policies behind WARN." Pet. App. 14a.[12]

However, there is no evidence to indicate that the burden of filing a WARN action within six months is any greater than that of timely filing an unfair labor practice charge. The "plant closings" or "mass layoffs" that can give rise to a cause of action under WARN are by their very nature obvious and not hidden from view. Their impact on affected employees is readily apparent and not difficult to assess. Moreover, one employee can sue for all, and any employee can bring a claim wherever the employer does business. 29 U.S.C. § 2104(a)(5). Additionally, appropriate legal representation is likely to be readily available to prospective litigants, given that WARN, unlike the NLRA, provides attorney's fees for successful claimants. *See* 29 U.S.C. § 2104 (a)(6). Not surprisingly, a large and growing number of claimants—without even the assistance of union representation—have filed WARN claims within six months of the triggering event.[13]

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[12] The Second Circuit applied an identical rationale in *Specialty Paperboard*, 999 F.2d at 55 (short statute of limitations under NLRA justified by "minimal" burden to pursue unfair labor practice charge).

[13] *See, e.g., Jurcev v. Central Community Hosp.*, 7 F.3d 618, 621-22 (CA7 1993) (two weeks), *cert. denied*, 114 S. Ct. 1830 (1994); *Johnson v. Peters Truck Lines*, 8 Indiv. Empl. Rights Cas. (BNA) 1036 (N.D. Cal. 1993) (approximately one month); *Moore v. On-Line Software Int'l, Inc.*, 8 Indiv. Empl. Rights Cas. (BNA) 1089 (N.D. Ill. 1993) (within six months); *Washington v. Aircap Indus. Corp.*, 8 Indiv. Empl. Rights Cas. (BNA) 1426 (D.S.C. 1992) (within six months); *Solberg v. Inline Corp.*, 740 F. Supp. 680 (D. Minn. 1990) (within six months); *Finkler v. Elsinore Shore Assocs.*, 725 F. Supp. 828 (D.N.J. 1989) (within six months); *In re Mr. Goodbuys of New York Corp.*, 164 B.R. 24 (Bankr. E.D.N.Y. 1994) (within five months); *In re Riker Indus., Inc.*, 151 B.R. 823 (Bankr. N.D. Ohio 1993) (within one month); *see also Cruz v.*

In addition to the ease of bringing WARN claims, other specific policy considerations fully support the application of a short limitations period. As the Senate Report indicated, WARN "establishes a comprehensive system for providing *prompt* adjustment and training services to dislocated workers." S. Rep. No. 62, 100th Cong., 1st Sess. 2 (1987) (emphasis added). This emphasis on prompt adjustment is reflected in the Act's remedial provisions, which limit damages for each affected employee to sixty days' wages and benefits. 29 U.S.C. § 2101(a)(6). Such a limited remedy, designed to ease the temporary burden of dislocation, quickly loses its meaning with the passage of time. Indeed, as the Sixth Circuit determined, this restrictive damage provision demonstrates Congress' intent to limit WARN litigation to prompt enforcement actions:

> By implementing a 60-day notice requirement, Congress clearly intended to provide short-term relief not only to affected employees, but to their communities and supporting state agencies as well. This purpose of bridging what would otherwise be a drain on resources would be defeated if not rapidly implemented. A prolonged statute of limitations would do nothing to achieve WARN's aim of starting employees on the road to retraining and reemployment before unemployment becomes a problem.

Peabody Coal, 38 F.3d at 856. *Cf. Lloyd v. United States Dep't of Labor*, 637 F.2d 1267, 1271 (CA9 1980) (Congress selected short limitations period "to ensure that benefits under the [NLRA] were used for the purpose envisioned" and "to encourage workers to file promptly.").

Local Union No. 8, Int'l Brotherhood of Elec. Workers, 34 F.3d 1148, 1450 (CA2 1994) (unionized employees, in midst of layoffs, timely sued their union for breach of duty of fair representation and their employer for allegedly violating WARN); *United Steelworkers v. North Star Steel Co.*, 809 F. Supp. 5 (M.D. Pa. 1992) (within one month), *aff'd in relevant part*, 5 F.3d 39 (CA3 1993), *cert. denied*, 114 S. Ct. 1060 (1994).

The Sixth Circuit's view—that the very nature of WARN remedies contemplates their expeditious delivery and thus a short limitations period—has been widely endorsed. One commentator summarized the underlying congressional intent as follows:

> [B]ecause WARN was intended to aid displaced workers by giving them time to seek other employment or training before being terminated, applying a state statute of limitations of several years or more does not serve the policy underlying WARN. Recovering damages several years after being laid off will not help a terminated employee search for immediate training or employment. Rather, these damages would merely ameliorate the employee's general living conditions, a remedy beyond the scope of WARN.

Mayo, 72 Wash. U. L.Q. at 557 (footnotes omitted). *See also Halkias,* 31 F.2d at 239 ("[A]pplication of expansive limitations periods would disserve WARN's most specific objective: the provision of a cushion of time for employees to explore other job opportunities and, if necessary, seek retraining.").[14]

A final policy consideration favoring the adoption of a short WARN limitations period is the likely state of an employer's business following a plant closing or mass layoff. If a lengthy limitations period for WARN actions is permitted—such as the Second Circuit's use of a six-year Vermont period—courts doubtless will confront stale WARN claims for which the records needed to address fundamental liability and damage issues will be impossible

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[14] In contrast, borrowing a state limitations period, such as those existing for contract claims, likely would undermine the federal policy favoring rapid resolutions of employment disputes. The limitations periods for state contract claims typically start at two years (Ind. Code § 34-1-2, setting forth periods from two to ten years) and go up to fifteen years (Ky. Rev. Stat. Ann. § 413.090 (2)). Such lengthy limitations periods would infuse WARN litigation with unnecessary costs and complexities.

to locate or no longer will be in existence.[15] In addition, with the passage of time, claimants and key witnesses will be increasingly likely to have dispersed, moving on to other jobs and other locations, thus further burdening such belated litigation. *See Halkias,* 31 F.3d at 238. *Cf. Johnson v. Graphic Communications Int'l Union Local 303,* 930 F.2d 1178, 1182 (CA7) (short NLRA limitations period prevents litigation after records have been lost or destroyed, witnesses have relocated, and memories have dimmed), *cert. denied,* 502 U.S. 862 (1991). Despite the Third Circuit's disregard of these pragmatic and policy considerations, Congress could not have intended a limitation policy that generates such impractical results without in any way advancing the purposes that WARN is designed to serve.

II. THE COURT'S CURRENT LIMITATIONS BORROWING DOCTRINE IS FLAWED AND SHOULD BE RE-EXAMINED.

Although the *DelCostello* framework conclusively establishes the applicability of the NLRA limitations period to WARN, the Court may wish to revisit the wisdom of its current borrowing doctrine. Specifically, it appears that the underpinnings of that doctrine are fatally defective—particularly now that Congress has rejected the most important ground for the doctrine's continued vitality. In its place, the Court could adopt a borrowing doctrine in which federal law is used almost exclusively to determine federal limitations periods.

As noted, the existing practice of applying state statutes of limitations to federal causes of action is premised on only the most tenuous of historical considerations. It was born out of the fiction that the Rules of Decision

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[15] Federal law—in keeping with the short limitations periods for labor and employment claims—only requires employers to retain payroll records indicating the names of employees and their paid remuneration for a period of three years. 29 C.F.R. § 516.5 (1994); 29 C.F.R. § 1627.3(a) (1994).

Act requires federal courts to borrow state law—an axiom no longer accepted by the Court. *DelCostello*, 462 U.S. at 160 n.13. *See also* Joseph L. Calamari, Note, *The Limited Reach of DelCostello v. International Brotherhood of Teamsters: A Statute of Limitations in LMRDA Title I Actions*, 56 Fordham L. Rev. 227, 245 n.19 (1987) ("Both the majority approach and Justice Scalia's view agree that the Rules of Decision Act does not mandate application of state limitations periods because the Act merely begs the question, authorizing federal courts to use state laws 'in cases where they apply.'") (citations omitted).

Although the nineteenth century view of the Rules of Decision Act has fallen into disfavor, the practice of using state law to fill gaps in federal substantive statutes has not. Without intensive consideration of the subject, the Court has premised its continued borrowing of state limitations periods on the belief that Congress "intends by its silence that we borrow state law." *Lampf*, 501 U.S. at 355 (quoting *Agency Holding Corp.*, 483 U.S. at 147).

But, in light of Congress' recent enactment of a "fallback" statute of limitations for all civil claims arising under federal legislation passed after December 1, 1990, it is highly doubtful whether Congress' legislative inaction with respect to limitations periods for pre-existing federal statutes should be interpreted as an endorsement of continued borrowing of state law. To the contrary, the legislative rationale for a new federal "fallback" statute applies with equal force to pre-existing federal statutes, and Congess appears to have recognized as much during its deliberations on the new law, 28 U.S.C. § 1658.[16] This legislation

[16] Because Section 1658 explicitly provides that it does not apply to pre-existing causes of action, the statute does not fix a limitations period for WARN. *Lampf*, 501 U.S. at 364 n.10 ("This new statute obviously has no application in the present litigation."). *See* Kimberly Norwood, *28 U.S.C. § 1658: A Limitation Period With Real Limitations*, 69 Ind. L. J. 477, 503-04 (1994).

was motivated by a congressional conviction that *the continued absorption of state limitations periods for federal statutes is undesirable.* As the Chair of the Senate Judiciary Committee observed:

> Statutes of limitations provide a specific time period after the contested event within which a case must be commenced. *At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. Borrowing, while defensible as a decisional approach in the absence of legislation, appeals* [sic] *to lack persuasive support as a matter of policy.*
>
> It also creates several practical problems: it obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitations periods.

See 136 Cong. Rec. S17,581 (daily ed. Oct. 27, 1990) (statement of Sen. Biden) (emphasis added).[17]

Congress has not been alone in recognizing the defects in the current limitations borrowing scheme. Indeed, Senator Biden's remarks in the Congressional Record were excerpted from the findings of the 1990 Report of the Federal Courts Study Committee, appointed by Chief Justice Rehnquist. *See* Federal Courts Study Committee, Judicial Conference of the United States, *Report of the Federal Courts Study Committee* (1990).

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[17] The House Report on Section 1658 contains similar language. *See* H. R. Rep. No. 734, 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6870. As commentators have noted, Section 1658 "addresses only a small portion of the borrowing problem because it is limited to new federal statutes." Katherine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations By Default*, 72 Neb. L. Rev. 454 (1993).

The Study Committee's analysis of *DelCostello* appears to reflect the views of many federal jurists. *See, e.g., Norris v. Wirtz,* 818 F.2d 1329, 1332 (CA7) ("This is one tottering parapet of a ramshackle edifice. Deciding which features of state periods of limitations to adopt for which federal statutes wastes untold hours.") (citation omitted), *cert. denied,* 484 U.S. 943 (1987). In *Short v. Belleville Shoe Manufacturing Co.,* 908 F.2d 1385 (CA7 1990), *cert. denied,* 501 U.S. 1250 (1991), the court (per Judge Easterbrook) offered the following summary of the many problems attributable to state borrowing:

> From the perspective of practitioners litigating cases originating in many states (especially class actions), the situation is a nightmare. Lawyers and courts alike devote untold hours to identifying proper state analogies and applying multiple (conflicting or cumulative) tolling doctrines. "This uncertainty and lack of uniformity promote forum shopping by plaintiffs and result in wholly unjustified disparities in the rights of different parties litigating identical claims in different states. Neither plaintiffs nor defendants can determine their rights with any certainty. Vast amounts of judicial time and attorneys' fees are wasted."

Id. at 1389 (quoting ABA Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions,* 41 Bus. Law. 645, 647 (1986).

This Court itself has recognized the social costs incurred by needless litigation over which state statutes of limitations might properly "characterize" a federal claim. In *Wilson v. Garcia,* 471 U.S. 261 (1985), the Court drew the following conclusion:

> [T]he legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters.

> On a human level, uncertainty is costly to all parties. Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.

Id. at 275 & n.34.

Recent commentaries have echoed these legislative and judicial doubts about the wisdom of continued state limitations borrowing and have drawn attention to the obvious adverse impact that this current policy has on the equitable administration of federal rights. One commentator summarized these concerns as follows:

> [B]orrowing state time-bars for federal claims causes serious equitable concerns. The state legislatures do not consider the federal interests at issue when they adopt a statute of limitations for a particular state right or category of state rights. Accordingly, the litigants' interests in the federal right, as well as society's interest in having that right asserted, are not part of the state's balancing process.
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> * * * *
>
> More importantly, borrowing state time-bars leads to the inequitable administration of federal rights. One of the main reasons for enacting a federal law, rather than leaving the problem to the states, is the need for uniformity. When the courts borrow state limitations periods for federal claims, federal rights vary from state to state because each state has its own statutes of limitations.

Nelson, 72 Neb. L. Rev. at 454 (footnotes omitted). *See also* Norwood, 69 Ind. L.J. at 512-13 ("[W]henever a state enjoys the right to decide the longevity of a federal statutory claim, federal interests are automatically frustrated. . . . [A] national cause of action should [not] affect litigants differently depending upon the state in

which the plaintiff is able to meet jurisdictional and venue requirements.") (footnotes omitted).

The Study Committee, the courts, and the commentators are correct in recognizing the fundamental deficiencies in the Court's existing limitations borrowing practice. Now that Congress has concurred in this assessment—thereby eliminating the principal justification for perpetuation of the current scheme—the time has come for a more efficient and rational borrowing doctrine. That doctrine should rely almost exclusively on federal law to determine federal statutes of limitations, thereby ensuring the equitable and uniform application of federal rights throughout the nation. Such uniformity will end practitioners' senseless "characterization" odyssey through state law, the corresponding lure of forum shopping, and the resulting waste of judicial and litigants' resources.[18]

Under an almost exclusive federal borrowing doctrine, the NLRA is clearly the most appropriate statute from which to borrow for the WARN limitations period. For the reasons stated above, the NLRA and WARN are closely analogous, and the two statutes share a similarity in purpose and structure unmatched in the federal statutes. Accordingly, the six-month NLRA limitations period should be applied to WARN.

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[18] Admittedly, a better solution to borrowing from other federal laws would be to have Congress enact a limitations period for every federal statute that is presently without one. For a thoughtful discussion of the subject, *see Short*, 908 F.2d at 1393-95 (Posner, J., concurring). Unless and until Congress takes such action, however—and it is not the sort of measure likely to be viewed as one of great urgency—borrowing from other federal laws is far superior to the present state of affairs.

CONCLUSION

The judgment of the court of appeals should be reversed. The case should be remanded with instructions to reinstate the district court's judgment in favor of the Petitioner.

Respectfully submitted,

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